RODIAH IBRAHIM & ANOR.

v.

TEOH CHIANG MENG

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 188 OF 1983]
26 APRIL 1984

TORT: *Negligent driving - Motor accident - Defendant admitted liability.*

DAMAGES: *Agreed damages in respect of 1st plaintiff - Dispute as to quantum of damages in respect of 2nd plaintiff - Serious disability in right arm but there was still use of it - 2nd plaintiff serviceman - Loss of future earnings after retirement at age 40 - Loss of pension and of gratuity.*

The 1st and 2nd plaintiffs sued the defendant for negligent driving of his motor-lorry which collided into a Vespa driven by Abdul Razak bin Haji Mohamad, deceased, with the 2nd plaintiff as his pillion rider.

The defendant admitted liability. By consent, judgment was entered for the 1st plaintiff on behalf of herself and the dependants of the deceased in the sum of RM17,000 as general and special damages against the defendant.

There was a dispute in respect of the quantum of damages in the case of 2nd plaintiff.

Held:

[1] On hearing of the evidence and observing the 2nd plaintiff, the Court was satisfied that although there was a serious disability in the right arm the second plaintiff with the aid of his left hand could still use his right hand; therefore he was awarded RM20,000 for pain and suffering.

[2] Future income would be awarded at RM270 per month being the difference in present salary and the maximum salary of a Staff Sergeant which he would be in 1991 at the age of 40, the age of retirement of servicemen. The round figure for loss of future earnings of his salary would be RM11,500.

[3] The 2nd plaintiff expected to work until the age of 60 years and an award of RM6,000 was awarded for loss of future earnings.

[4] RM9,500 for future loss of pension and RM1,766 for gratuity were also awarded.

[5] Special damages for a sum of RM546 as agreed.

[6] Interest awarded for general damages for pain and suffering and loss of amenities at eight per cent per annum from date of service of writ and four per cent per annum on special damages from date of accident.

[2nd plaintiff entitled to RM48,766 as general damages and RM546 as special damages with interest and costs.]

Cases referred to:

Lim Eng Kay v. Jaafar [1982] CLJ (Rep) 190; [1982] MLJ 156
Jefford v. Gee [1970] 1 All ER 1202

For the plaintiffs - Triptipal Singh Bhar; M/s. Triptipal Singh & Co.
For the defendant - P.R. Manecksha; M/s. V.P. Nathan & Partners

JUDGMENT

Mohamed Dzaiddin J:

In this running down case both the first and second plaintiffs have sued the defendant for negligent driving of his motor-lorry registration number JY 5535 which collided into the rear of motor Vespa PE 5470 driven by Abdul Razak bin Haji Mohamad, deceased, with the second plaintiff as his pillion rider. The collision occurred along Jalan Megat Harun, Bukit Mertajam on 15 August 1980 at about 6.00 p.m.

The defendant had admitted liability. By consent, judgment was entered for the first plaintiff on behalf of herself and the dependants of Abdul Razak bin Haji Mohamad, deceased against the defendant in the sum of RM17,000 as general and special damages.

In the case of second plaintiff, there was a dispute as to the quantum of damages.

On the day of the accident, the second plaintiff was an army corporal attached to 2 Company Angkut, Taiping, Perak. Now, he is attached to the Army Medical Unit at Camp Sungei Ara, Pulau Pinang holding the same rank of a corporal. He is now 33 years old and as a serviceman he will retire at the age of 40 years. I would assess general damages under the following heads:-

Pain and suffering and loss of amenities

As a result of the accident, he suffered injuries to his right arm. There was extensive soft tissue injury to right anti-cubital fossa with skin loss. There was laceration on his right leg. There was no fracture. Skin graft was done to his right cubital fossa ulcer. He was discharged about two months after the accident and followed with physiotherapy. The wound had then healed.

On 21 September 1981 he was seen by Dr. Bell in Penang for a second opinion on the injuries. The report of Dr. Bell (Exhibit 'P5') stated as follows:

> *On Examination:*
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> An area 3" by 5" in front of right elbow is healed by a large skin graft and covers a soft tissue deficit which involves the flexor tendons of the biceps and brachialis muscles. The nerves in the front of the elbow (median and ulna) appear to have escaped injury except for superficial cutaneous nerves to the front of the forearm. Right elbow movements are from 0 degree to 110 degrees of flexion = a deficit of 40 degrees.
>
> Although the range of movement is adequate there is a very serious loss of power in extension as well as flexion of the elbow joint.
>
> There is no paralysis of the forearm or hand muscles but power in the hand grip and wrist is poor due to inability to fix the elbow firmly.
>
> There is loss of tactile sensation over the front of the right forearm down to the wrist.
>
> *Conclusion:*
>
> There is serious permanent disability due to injury to the attachment of the flexor muscle from the arm to the forearm at the right elbow resulting in serious loss of power in the whole right arm. Patient is unable to lift or carry heavy weights with the right hand and there is loss of dexterity in the limb.

Dr. Bell was called to testify for the second plaintiff. He stated that the power of the second plaintiff's arm was grade 3 as compared to grade 5 (full power). However, under cross-examination he agreed with defendant's Counsel that the only disability was that he would not be able to use his right hand to do heavy work. He had to get his right arm supported before being able to use his right hand to write. The dexterity was good. Having heard this evidence and on observing the second plaintiff, I am satisfied that although there was serious disability to his right arm, the second plaintiff, with the aid of his left hand could still use his right hand e.g. writing. Therefore, based on the authorities referred to me by Mr. Paul Manecksha, in my judgment the sum of RM20,000 would be a fair and reasonable amount to compensate the second plaintiff in the circumstances of this case.

Loss of future earnings

As for this heading, damages would be for the probable loss of promotional prospect.

The plaintiff was a corporal at the time of the accident on 15 August 1980. He was promoted to the present rank on 1 March 1977. It was established in evidence that he had to pass the army clerical examination and the regimental training course before being eligible for consideration for promotion. The plaintiff had stated that he was selected to attend the regimental training course in 1979 but had opted to attend in 1980. He said that in the normal circumstances he was due for promotion to the rank of a sergeant in 1981. Again in my opinion, there was no guarantee that he would be promoted a year after attending the regimental training course had it not been for the accident. For reasons known to himself, the plaintiff appeared to be very confident that he would have reached to the top of the junior officers' rank of Warrant Officer One had it not been for the accident. A letter from the Commanding Officer ('FAB2') dated 10 January 1981 in reply to his Counsel fortified his assertion to the extent that there was no reason why he could no be considered for promotion to the rank of Warrant Officer One had he been fit. That was all what was said. Then, we have the evidence of Major Dr. Omar (PW2), the present superior officer of the second plaintiff. He stated that he found the second plaintiff to be above average in his work. He was of the opinion that had the plaintiff attended the regimental course he would be a staff sergeant by now.

Based on the evidence and submission of Counsel, in my opinion, on the balance of probability the highest rank he would have reached would be a staff sergeant. I cannot agree with the submission of his Counsel that I should assess the prospect of plaintiff's future income on the basis that he would become a Warrant Officer One at the time of his retirement. To me that was only a possibility. In the circumstances, I would assess the plaintiff's loss of future income on the basis that he would earn the salary of a staff sergeant at the time of his retirement in 1991.

The method of calculation would be on the basis of multiplicand (representing income) times the years' purchase (see: *Lim Eng Kay v. Jaafar* CLJ (Rep) 190; [1982] 2 MLJ 156). On the question of years' purchase, it is not disputed that the second plaintiff has another seven years before retiring. Taking into consideration all the uncertainties of life, I think it is reasonable to fix four years as the multiplier. As for the income, I accept the calculation of Mr. Manecksha of RM270 being a round figure for the difference in his present salary and the maximum salary of a staff sergeant which he would only be drawing in 1991. Therefore, based on the annuity table, his loss of future earnings of his salary would be in the round figure of RM11,500.

Loss of future earnings after retirement

First, what would be his expectation of working life from the time of his retirement. In this case, we know as a fact that the second plaintiff will retire at the age of 40 years. He is a healthy young man and I am quite sure he would be able to continue working until the age of 60 years. It is common knowledge that members of the Armed Forces are provided with pre-retirement training to enable them to seek employment after their retirement from the army. Therefore, the issue is how much would he be able to earn after the age of 40 years when he leaves the army. Then, after ascertaining the amount, the next question is how much would his future loss be by way of a reduction in his earning capacity because of his hand injury? In my opinion, this would certainly be a difficult, if not, futile exercise to go into because we cannot in the circumstances of this case say the type of job he would be getting, if anything, after his retirement. It would merely be a guesswork. I could only say, in all probability there might be a reduction in his earning capacity due to this injury to entitle him to some damages. In the circumstances I would award RM6,000 under this heading.

Loss of pension and gratuity

It is established that the difference in the pension between a corporal and a staff sergeant is RM105. The second plaintiff could only be entitled to his pension when he retires at 40 which would be another seven years from today. In all probability, he would continue to receive the pension until the age of 60 years. I think a multiplier of ten years would be fair and reasonable and in the circumstances I award RM9,500 being his future loss of pension.

As for gratuity, the difference is RM2,646 and in view of the fact that he would be entitled when he retires in 1991 and subject to contingencies I would deduct one-third from the amount, thus making it RM1,766.

Special damages

This was agreed at RM546.

Interest

Following the principle in *Jefford v. Gee* [1970] 1 All ER 1202, I award interest for general damages for pain and suffering and loss of amenities at eight per cent per annum from date of service of writ and four per cent per annum on special damages from date of accident.

In my judgment, the second plaintiff is therefore entitled to RM48,766 as general damages and RM546 as special damages with interest and costs.

Also found at [1985] 1 CLJ 378